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No. 90-1805

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

LAUREL SAND & GRAVEL, INC.,
Petitioner,

v.

CSX TRANSPORTATION, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondent respectfully requests that the Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Fourth Circuit.[1]

PRELIMINARY STATEMENT

In seeking review by this Court of the decision of the United States Court of Appeals for the Fourth Circuit, Petitioner Laurel Sand & Gravel, Inc. ("LSG") claims to have found erroneous statements of law in what actually was no more than the routine application of settled legal principles to the facts, producing a result with which LSG disagrees. This case presents no conflict with other decisions, no significant legal issues, and

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[1] *Laurel Sand & Gravel, Inc., et al v. CSX Transportation, Inc.*, 924 F.2d 539 (4th Cir. 1991).

no other "special and important reasons" for granting a writ of certiorari. Sup. Ct. R. 10.

COUNTERSTATEMENT OF THE CASE

Procedural Background. In 1987, LSG brought this civil antitrust action in the United States District Court for the District of Maryland. LSG alleged that Respondent CSX Transportation, Inc. ("CSXT"),[2] had conspired with one of its customers, Millville Quarry, Inc., to exclude LSG, a potential CSXT customer, from the aggregate construction materials market in the Baltimore-Washington, D.C. metropolitan area. LSG was joined in its suit against CSXT by the Maryland Midland Railway, Inc. ("MMR"), a short-line railroad that had sought a grant of trackage rights over CSXT's rail lines in order to serve LSG. MMR also sued CSXT under Section 2 of the Sherman Act, alleging that CSXT had "monopolized" rail transportation of aggregate construction materials through its denial of trackage rights.

Despite one and a half years of discovery, LSG and MMR failed to uncover any direct evidence of the alleged CSXT/Millville conspiracy. (Pet. App. 31a). At the close of discovery, CSXT filed a motion for summary judgment setting forth evidence supporting its claim that its conduct was wholly unilateral and legitimate. In opposition, LSG and MMR presented what they claimed was circumstantial evidence of an alleged unlawful agreement between CSXT and Millville. Viewing the evidence in the light of this Court's *Matsushita* and *Monsanto* decisions,[3] the district court found that this circumstantial evidence did not tend to exclude the possibility of inde-

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[2] CSXT's list of affiliated companies pursuant to Rule 29.1 is contained in an Appendix following Respondent's Brief in Opposition.

[3] *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984).

pendent action by CSXT. The court also found that LSG lacked standing under the principles stated in this Court's *Illinois Brick* decision.[4] Accordingly, the district court granted CSXT's motion on January 26, 1989, and subsequently entered an order dismissing the case.

The appeal was argued on October 2, 1990, and the Court of Appeals for the Fourth Circuit rendered its decision affirming the district court on January 30, 1991. On February 27, 1991, the Court of Appeals denied LSG and MMR's petition for rehearing and suggestion for rehearing *en banc*.

LSG alone has brought the petition in this Court.

The Record Before the Court of Appeals. LSG is the largest producer of sand, gravel and crushed stone ("aggregates") in the Baltimore-Washington area. In 1986, LSG sought to add to its market share by purchasing a new stone quarry (the "Barrick" quarry) located in Woodsboro, Maryland. (Pet. App. 17a). Rather than utilize truck transportation (as LSG and most of its competitors historically had done), LSG sought to explore rail transportation as an alternative for shipping aggregate products from Barrick to the Baltimore-Washington area. (Pet. App. 18a-19a).

A competitor, Millville, had pioneered the use of rail transportation in the early 1980s to move crushed stone products to the Baltimore-Washington market. (Pet. App. 20a). Millville's stone quarry was located in Millville, West Virginia, immediately adjacent to the CSXT main line and therefore ideally situated for rail movement. By 1985, Millville had established an effective distribution network for crushed stone dependent upon rail transportation. (Pet. App. 5a, 20a-21a). Millville was the first supplier to deliver aggregates by rail to the Baltimore-Washington market, which to this day remains dominated by truck transportation. (Pet. App. 20a).

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[4] *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

LSG's Barrick quarry is situated alongside the tracks of MMR, a short-line railroad whose tracks ultimately connect with those of CSXT at Emory Grove, Maryland. (Pet. App. 17a). Unlike Millville's quarry, the quarry LSG purchased "is located where crushed stone must be transported over the lines of both MMR and CSX to reach Annapolis Junction." (Pet. App. 26a). LSG must, therefore, utilize the tracks of two railroads, instead of one, to transport its stone to LSG's Annapolis Junction property by rail. Alternatively, LSG could move its stone from the Barrick quarry directly by truck. (Pet. App. 32a-33a).

After acquiring its option to purchase the Barrick quarry in 1986, LSG contacted MMR, who in turn contacted CSXT concerning a possible "joint line" rail movement of Barrick stone with MMR. (Pet. App. 18a). Under this proposal, an MMR train would carry LSG's stone over MMR's tracks from the Barrick quarry to CSXT's tracks at Emory Grove. As proposed by MMR, the cars containing the stone would then be uncoupled and hitched to CSXT locomotives, which would then haul the stone over CSXT's tracks to LSG's Annapolis Junction property. The lowest price at which MMR could profitably perform its portion of the joint haul was $1.55 per ton. (Pet. App. 26a). CSXT initially offered to perform its portion of the joint line movement, and to supply the rail cars for the entire movement, for $2.95 per ton. (Pet. App. 18a). LSG rejected the offer on the ground that its transportation costs under the combined MMR-CSXT rate would render it uncompetitive with Millville.

Recognizing that a joint line arrangement would be economically infeasible, MMR on November 7, 1986 requested that CXST grant MMR the direct use of CSXT's tracks ("trackage rights") from the MMR interchange at Emory Grove to LSG's Annapolis Junction property. If CSXT was willing to rent its track to MMR, MMR in

turn proposed to haul LSG's stone in MMR trains the entire distance, over both MMR's and CSXT's tracks, from the Barrick quarry to Annapolis Junction. CSXT declined MMR's trackage rights proposal and stated that it would prefer "to work with [LSG] through revenue adjustment [on joint line rail service] rather than through a trackage right arrangement." (Pet. App. 18a). CSXT made several proposals in this regard in the ensuing months, including a $2.12 per ton rate that CSXT believed was $.01 above its variable costs for its portion of the haul. (Pet. App. 27a). These offers were rejected by LSG, which elected to pursue the instant litigation.

In discovery, LSG's economist estimated CSXT's actual cost to be $1.72 per ton. (Pet. App. 26a). However, LSG conceded that even if CSXT had performed its portion of the haul at this estimate of cost, the combined MMR-CSXT rate of $3.27 per ton would still be "well in excess of the [estimated $2.50 per ton] rate available to its competitor Millville because of its geographic advantage." (Pet. App. 26a). Also recognizing the economic infeasibility of joint line rail service to LSG's quarry, LSG's own damages expert concluded that LSG's alleged injuries depended entirely upon the presumption that, absent the alleged conspiracy, CSXT would have rented its tracks to MMR pursuant to a trackage rights arrangement. (J.A. 61-62).[5] When asked in a deposition if LSG claimed any damages other than those identified in this damage analysis, LSG's counsel stated for the record that LSG claimed no other damages.

As recognized by the Court of Appeals, Millville's lower costs meant that "no joint track agreement would have made LSG competitive with Millville, making trackage rights the only economically viable option." (Pet. App. 6a). The district court thus concluded that "Plaintiffs . . . structured their lawsuit narrowly so as to be based solely on the refusal of trackage rights." (Pet. App. 27a).

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[5] "J.A." refers to evidence contained in the Joint Appendix which was submitted to the Court of Appeals.

CSXT's motion for summary judgment raised two arguments for dismissal of the conspiracy claim. First, CSXT noted that, because the plaintiffs' alleged injuries were based solely on the denial of MMR's trackage rights request, LSG had the burden of showing that CSXT's refusal to rent its track to MMR was the product of an illegal agreement with Millville. Because LSG had failed to uncover any evidence tending to negate the legitimate reasons proffered by CSXT for its decision to offer joint line rail service rather than rent its tracks to another railroad, and because LSG had proffered no evidence linking the trackage rights denial to any other evidence of conspiracy, CSXT argued that the conspiracy claim should be dismissed. The district court agreed, finding that "[LSG] and MMR are disadvantaged solely because of their geographical circumstance, and not because of any improper denial of access by CSX." (Pet. App. 43a).

Second, CSXT pointed out that under MMR's trackage rights proposal, CSXT would rent its track to MMR, and MMR in turn would sell its transportation services to LSG. Consequently, LSG would have been an indirect purchaser of CSXT's track, and thus under the *Illinois Brick* rule, LSG did not possess standing to sue CSXT for CSXT's refusal to rent its tracks to MMR. The district court granted CSXT's motion on this ground as well.

Finally, CSXT asked the district court to dismiss MMR's monopolization claim, in which MMR alleged that CSXT's refusal to grant MMR trackage rights was tantamount to denial of access to an "essential facility." The court granted CSXT's motion, finding that CSXT's reasons for refusing to rent its track were legitimate and its joint line rate proposals constituted an offer of reasonable access to CSXT's rail lines. (Pet. App. 40a-41a).[6]

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[6] MMR is not a party to LSG's petition for a writ of certiorari and has not sought review of the dismissal of its monopolization claim.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS PROPERLY APPLIED THE SUMMARY JUDGMENT STANDARD SET FORTH IN MATSUSHITA.

In *Matsushita*, the Court set forth the standard applicable to motions for summary judgment in connection with allegations of antitrust conspiracy:

> [A]ntitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case. Thus, in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. *Id.* at 764. *See also Cities Service*, [391 U.S.] at 280. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence that "tends to exclude the possibility" that the alleged conspirators acted independently. 465 U.S. 764.

475 U.S. at 587-88.

This analysis focuses on the conduct that causes injury, and not on "other conduct involved in the alleged conspiracy [which] cannot have caused such an injury." 475 U.S. at 584 n.7. Accordingly, both the district court and Court of Appeals focused upon the alleged injury-causing activity—the denial of trackage rights—and concluded that this activity, either considered alone or in the context of other alleged conspiratorial conduct, did not satisfy the accepted *Matsushita* standard. Both courts properly and thoroughly reviewed the record for evidence that might tend to exclude the possibility of independent action by CSXT, and both courts found the record lacking in this regard.[7]

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[7] LSG makes the somewhat halfhearted argument that the courts below required LSG to present enough evidence to "actually exclude

1. LSG's primary argument is that by discussing separately each of the transactions LSG had alleged as circumstantial evidence of a conspiracy the Court of Appeals "compartmentalized" the evidence too tightly. LSG infers that because the court examined each allegation separately for any indication of conspiracy, it somehow failed to take these episodes into account when it applied the *Matsushita* standard to the denial of trackage rights, the only incident about which LSG ultimately complains. However, there is nothing in either of the lower courts' decisions to suggest that LSG's alleged evidence of conspiracy with respect to these various transactions was not fully considered. Rather, the courts simply recognized, first, that "CSX has offered a rational business explanation for *each* of the transactions" (Pet. App. 23a) (emphasis added), and second, that LSG's allegations in any event did not tend to exclude the possibility that CSXT's denial of trackage rights was unilateral. Indeed, the opinions reflect a careful review of LSG's allegations, resulting in conclusions by both courts that there was no evidence from which it could be inferred that CSXT's conduct, including its refusal to rent its tracks to MMR, was the product of a conspiracy.

A brief review of the lower courts' findings with respect to the particular transactions relied upon by LSG reflects the straightforward application of the *Matsushita* standard.

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any possibility" of independent action by CSXT, whereas *Monsanto* and *Matsushita* require only enough evidence to "tend to exclude" that possibility. (Pet. 22). Even a cursory review of these opinions, however, leaves no question that the courts considered and applied the correct summary judgment standard. The District Court quoted or stated the words "tends to exclude" no less than five times throughout its opinion. (Pet. App. 30a, 31a, 32a). Likewise, the Court of Appeals explicitly stated the correct standard three times. (Pet. App. 7a, 8a). LSG's implication that the lower courts announced a controversial new summary judgment standard thus is wholly unsupported.

The 1984 Lease Agreement. Both the Court of Appeals and the district court found that CSXT's 1984 lease to Millville of its "wye" tracks at Annapolis Junction was in CSXT's best unilateral interests, inasmuch as Millville was at the time developing its distribution network and actively negotiating for use of CSXT's rail service. By contrast, LSG in 1984 had no plans for rail shipment of aggregates and "did not even own a stone quarry." (Pet. App. 24a).[8]

The Rockville Crushed Stone Rate Negotiations. Both courts below found that CSXT's proposed rate increase to Rockville Crushed Stone (which had nothing whatsoever to do with LSG) was consistent with CSXT's desire to maximize profits and did not reflect a desire to exclude competitors of Millville from the market. Indeed, far from excluding a new competitor, the CSXT/Rockville rate negotiations (during which CSXT subsequently offered Rockville a lower rate) ultimately resulted in the fact that "CSX and Rockville Crushed Stone actually did execute a rail transportation contract." (Pet. App. 24a).

Sale of Fulton Station Property to Millville. As noted by the district court, no inference of conspiracy could be drawn from CSXT's acceptance of Millville's bid for the Fulton Station property since "Millville offered both a higher price for the property and offered to move more stone through the property." (Pet. App. 24a). Again, LSG at no time sought access to this property and indeed had nothing to do with this transaction.

CSXT's "Joint Line" Rate Proposal. LSG contends that CSXT's initial offer to perform its portion of a joint line arrangement at $2.95 per ton was so high that it could

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[8] In any event, the lease did not block LSG's access in any real sense (assuming LSG subsequently purchased a quarry), because "[o]ther points of [LSG's] property are contiguous to the CSX tracks from which a spur track could be built." (Pet. App. 23a-24a).

not have been intended to be accepted. As both courts noted, however, this argument ignores CSXT's subsequent offer of a series of lower rates in an effort to obtain LSG's business, including an essentially at-cost rate that LSG rejected. (Pet. App. 4a, 19a, 27a, 39a). LSG's unsupported allegation thus fails, as the courts concluded, to refute CSXT's evidence that its offers of joint line service were made in good faith and without regard to Millville's interests.

CSXT's Trackage Rights Denial. As both courts determined, LSG introduced no evidence whatsoever suggesting that the trackage rights denial, the only CSXT conduct that LSG alleges caused it injury, was "prompted by conspiracy." (Pet. App. 2a). To the contrary, both courts concluded that CSXT introduced substantial, unrefuted evidence that it declined to pursue a track rental in favor of joint line rail service based on unilateral, legitimate and rational business concerns. (Pet. App. 9a, 32a, 41a, 42a).[9] Indeed, LSG's own expert conceded that CSXT's concerns regarding rental of its tracks were legitimate. (J.A. 698-99).

2. LSG's second contention—that the Court of Appeals "fail[ed] to honor the rule that separate agreements for each act in furtherance of an unlawful agreement need not be proven" (Pet. 19)—fares no better. Nothing in the court's opinion suggests that the court required LSG to prove a separate illegal agreement between CSXT and Millville specifically relating to the trackage rights denial in order to impose liability for that denial. What the Court of Appeals did require was evidence indicating

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[9] Petitioner's suggestion that CSXT should have thought to offer MMR a "run-through" arrangement (Pet. 11) simply is not an issue in this case because Petitioner *never asked CSXT to provide run-through services*, and indeed there is no evidence anywhere in the record that this hypothetical arrangement was ever discussed by anyone, much less considered and rejected by CSXT, much less considered and rejected pursuant to some illegal agreement with Millville.

that the trackage rights denial was "prompted by conspiracy." (Pet. App. 2a).

It is hornbook law that, in order to impose liability for a conspiracy, there must be an "overt act in furtherance of the conspiracy that causes injury to the plantiff." *Bivens Garden Office Building, Inc. v. Barnett Bank of Florida*, 906 F.2d 1546, 1550 n.7 (11th Cir. 1990), *cert. denied*, —— U.S. ——, 111 S. Ct. 1695 (1991). *See also Lawrence A. Sullivan, Handbook of the Law of Antitrust* § 109 at 311-15 (1977) (defining the classic § 1 conspiracy). In holding that the trackage rights denial was *not* "in furtherance of a conspiracy," the Court of Appeals found that the reasons advanced by CSXT for the action it took were entirely legitimate, and that LSG had failed to produce sufficient evidence to tend to exclude those reasons as the true basis for CSXT's action.[10]

LSG claims that the Court of Appeals' conclusion was based solely on erroneous factual findings that CSXT did not consider Millville's position on trackage rights and that Millville was unaware of either the request or the refusal—hardly an issue warranting this Court's attention. (Pet. 13). In fact, however, both courts below not only were correct in these findings, but also quite clearly considered CSXT's affirmative evidence of legitimate business reasons underlying its decision not to rent its tracks. Specifically, the district court discussed in detail the unrebutted affidavit of Frederic Yocum, the CSXT Vice President who denied the trackage rights request. Mr. Yocum explained that granting MMR's request would have meant a radical and unprecedented departure from CSXT's established business practices and

[10] The fact that the Court of Appeals found that the trackage rights denial was not "prompted by conspiracy" also disposes of LSG's remaining objection to the court's application of *Matsushita*. LSG's statement that an otherwise legal action may become illegal if undertaken "pursuant to" an unlawful conspiracy is both true and irrelevant. The point of the Court of Appeals' opinion is that LSG failed to produce any evidence tending to show that the trackage rights denial was linked in any way to any conspiracy.

could create labor relations problems, safety hazards, traffic congestion, and disruption of normal relationships with other feeder railroads. (Pet. App. 42a).

Both courts below recognized that in renting its tracks to another railroad CSXT would "be diverted from the operating side of the railroad business and be relegated to the status of 'toll taker.'" (Pet. App. 12a, 42a). The district court also recognized that "it would not be feasible for CSX to provide trackage rights without altering the very basic nature of its permissible business and, indeed, the railroad industry." (Pet. App. 42a). The court thus concluded that "[t]he record contains ample business justification for CSX[T]'s decision not to enter the track renting business." (Pet. App. 41a). LSG's failure to produce any evidence to refute these facts led both courts to conclude that LSG simply had failed to adduce sufficient evidence linking CSXT's conduct to any alleged illegal conspiracy to withstand summary judgment.

3. LSG's final contention is that the Court of Appeals' application of the *Matsushita* standard conflicts with the Ninth Circuit's application of the standard in *In re Coordinated Pretrial Proceedings In Petroleum Products Antitrust Litigation*, 906 F.2d 432 (9th Cir. 1990) (hereinafter "*Chevron*"), *cert. denied*, —— U.S. ——, 59 U.S.L.W. 3726 (1991).[11]

In *Chevron*, the Ninth Circuit held that where an antitrust plaintiff relies entirely upon circumstantial evidence of conspiracy, a defendant will not be entitled to summary judgment unless, in addition to demonstrating that its conduct is consistent with other plausible explanations, it also shows that "permitting an inference of conspiracy would pose a significant deterrent to beneficial pro-competitive behavior." 906 F.2d at 440. The Ninth Circuit acknowledged that its "deterrent to bene-

[11] Subsequent to the filing of LSG's petition, this Court denied the petition in *Chevron*.

ficial pro-competitive behavior" requirements was not explicitly stated in either *Monsanto* or *Matsushita*, but stated that it found the idea implicit in the Supreme Court precedents.

Petitioner is correct in saying that the Court of Appeals below did not expressly adopt the standard stated by the Ninth Circuit in *Chevron*. In the present case, the Fourth Circuit merely set forth, without embellishment, the standard as stated by this Court in *Monsanto* and *Matsushita*. It then proceeded to apply that standard to the undisputed facts. The case called for nothing more. Whatever the Ninth Circuit's elaboration on *Monsanto* and *Matsushita* means—whether it will develop into a fact-based inquiry, or an abstract form of economic assessment—there is no indication that it would have affected the outcome of this case. For example, it is difficult to see how the Ninth Circuit could apply its rule to require CSXT to offer services at a rate lower than its own cost, to sell its property at something other than the best price it could obtain, or to fundamentally alter the nature of its business through a rental of its tracks.

In sum, the opinion of the Court of Appeals in this case establishes no new or unique summary judgment requirement, and merely adheres closely to the decisions of this Court.

II. THE COURT OF APPEALS PROPERLY HELD THAT PETITIONER DID NOT HAVE STANDING.

1. The Illinois Brick Doctrine. Under the principles established in *Hanover Shoe, Inc v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), an "indirect purchaser" of goods or services is deemed not to have been "injured in [its] business or property" within the meaning of Section 4 of the Clayton Act. This Court consistently has recognized that a contrary rule would undermine the

policies of the antitrust laws by unduly complicating apportionment of damages between direct purchasers and subsequent indirect purchasers, to whom some of the "injury" may or may not be passed. In both of these decisions, the Court came to the judgment that:

> [T]he antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it.

Illinois Brick, 431 U.S. at 734-35, citing *Hanover Shoe*, 394 U.S. 481. Only last term the Court refused to carve exceptions in this well established doctrine. *Kansas v. Utilicorp United, Inc.*, —— U.S. ——, 110 S. Ct. 2808, 2817 (1990).

Contrary to LSG's contention, this rule limiting antitrust standing to directly injured parties is not confined to cases involving an illegal "overcharge." *See, e.g., McCormack v. National Collegiate Athletic Ass'n.*, 845 F.2d 1338, 1342 (5th Cir. 1988) (indirectly injured university alumni, football players, and cheerleaders lacked standing to sue for alleged antitrust violations which restricted benefits to student athletes); *Adams v. Pan American World Airways, Inc.*, 828 F.2d 24 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 934 (1988) (defunct airline's former employees lacked standing to complain of alleged antitrust conspiracy which drove their employer out of business and indirectly caused plaintiffs to lose employment); *Eagle v. Star-Kist Foods, Inc.*, 812 F.2d 538, 542 (9th Cir. 1987) (crew members of fishing vessels lacked standing to sue for alleged conspiracy among canneries to set artifically low tuna prices, which caused indirect reduction in crew members' wages). The common thread running through these cases is that the plaintiffs' alleged injuries—*regardless* of the nature of those injuries—are indirect, and thus insufficient to confer antitrust standing under *Illinois Brick*.

As the district court correctly determined, it is undisputed that under the terms of the proposed trackage rights arrangement that forms the basis of LSG's damages claim, "[t]he track rights would be granted to MMR and MMR would resell them [to LSG] as part of its overall service of rail transportation of aggregates." (Pet. App. 34a). Because MMR alone was to purchase trackage rights from CSXT, any injury to LSG would first have to flow through MMR. LSG thus would have been an "indirect purchaser" and does not possess standing to sue with regard to this transaction.

2. The Alleged "Focus" of Conspiracy. In a brief argument, LSG contends that the *Illinois Brick* rule should not apply if an indirect purchaser is the " 'focus' of an unlawful conspiracy." (Pet. 26). LSG's reliance on *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), in support of this contention is, however, wholly misplaced. Contrary to LSG's indirect purchaser status here, in *McCready* the plaintiff was a *directly* injured party, and was *not* the focus of the alleged conspiracy. In allowing the plaintiff to pursue her claim, the Court thus implicitly reaffirmed the importance of the *Illinois Brick* principle: Since McCready fell within the class protected by Section 4, and was not barred by the *Illinois Brick* rule, there was no reason to dismiss her claim merely because she was not the focus of the conspiracy. That decision thus cannot plausibly be viewed as altering in any way, much less eroding, *Illinois Brick's* indirect purchaser rule.

Moreover, contrary to Petitioner's suggestion, the Court of Appeals correctly applied *McCready* to the facts of this case. The Court of Appeals acknowledged a critical distinction—unmentioned in LSG's petition—between the plaintiff's injuries in McCready and the alleged injuries of LSG in the present case:

> While the subscribers [in McCready] suffered direct and readily discernible economic harm from the

> health plan's refusal to reimburse them for psychological care, *LSG's harm from the refusal of trackage rights is discernible but indirect.* The subscriber lost money spent for a psychologist's care; *LSG only lost potential savings on transportation costs through direct purchaser MMR*, and possible profits from trackage rights. Under the *Hanover Shoe/Illinois Brick* standard, LSG as an indirect purchaser has no standing.

(Pet. App. 10a) (emphasis added).

Petitioner is asking this Court to create an exception to the *Illinois Brick* standard—for indirect purchasers that allegedly are the "focus" of a conspiracy—that has been expressly rejected by every Circuit that has specifically considered it. *See Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958, 966 (3d Cir. 1983), *cert. denied*, 465 U.S. 1024 (1984) ("The issue is not whether Appellees . . . are the direct targets of an alleged conspiracy, but rather whether they are in the class of persons considered to be injured in their business or property under Section 4 by an antitrust violation"). *See also State of Illinois ex rel. Hartigan v. Panhandle Eastern*, 852 F.2d 891, 898 (7th Cir.), *cert. denied*, 488 U.S. 986 (1988) ("We are unwilling to complicate the administration of *Illinois Brick* by trying to distinguish between difficult and easy apportionment cases").

The point of *Illinois Brick* is that a clear antitrust standing rule is essential to efficient and effective private antitrust enforcement. By its nature, it thus cannot permit *ad hoc* exceptions that would embroil the district courts in complex damages apportionment and otherwise undermine the incentives of directly injured parties to bring suit. Recognizing this principle, this Court has declined to permit any erosion of the indirect purchaser rule:

> In sum, even assuming that any economic assumptions underlying the *Illinois Brick* rule might be dis-

> proved in a specific case, we think it an unwarranted and counterproductive exercise to litigate a series of exceptions. Having stated the rule in *Hanover Shoe* and adhered to it in *Illinois Brick*, we stand by our interpretation of § 4.

Utilicorp United, —— U.S. ——, 110 S. Ct. at 2817.

3. Injunctive Relief. For the first time in the four years since this litigation began, Petitioner makes reference to having included a claim for "injunctive relief" in its initial complaint. Petitioner also contends—again for the first time in this litigation—that the limitations on antitrust standing stated in *Illinois Brick* should not extend to its claim for injunctive relief. Indeed, LSG concedes in its petition that it "did not explicitly raise the § 16 issue below." (Pet. 24 n. 47).[12] It is more accurate to say that this argument was raised neither explicitly nor implicitly, and thus neither of the lower courts was given any opportunity to consider it.

"Where issues are neither raised before nor considered by the Court of Appeals, this Court ordinarily will not consider them." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). *See Miree v. DeKalb County*, 433 U.S. 25, 34 (1977) ("The fact that this asserted basis of liability is so obviously an afterthought may be some indication of its merit, but since it was neither pleaded, argued, nor briefed either in the District Court or in the Court of Appeals, we will not consider it.").[13] Because

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[12] Contrary to Petitioner's attempt to explain its silence on the issue, it was not "subsumed" in any question presented to the Court of Appeals. If Petitioner sought to present the claim, it needed only to draw a distinction between its injunctive claims and damages claims for *Illinois Brick* purposes. It did not do so in the lower courts at any time.

[13] *See also EEOC v. FLRA*, 476 U.S. 19, 24 (1986) (dismissing writ of certiorari as improvidently granted where petitioner did not raise issue in Court of Appeals); *Lawn v. United States*, 355 U.S. 339, 363 n.16 (1958) ("Only in exceptional cases will this Court review a question not raised in the court below.").

LSG elected not to present this issue either to the district court or the Court of Appeals, neither court's opinion addresses the applicability of *Illinois Brick* to claims for injunctive relief. Because the courts below established no precedent on this issue, and because it was LSG's own decision to refrain from raising the matter until now, there are no exceptional circumstances which warrant review of this issue.

CONCLUSION

For the above-stated reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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June 24, 1991

APPENDIX

APPENDIX

CSX TRANSPORTATION, INC.'S RULE 29.1 LIST OF INTERESTED PARTIES

All of the common stock of CSX Transportation, Inc. is owned by CSX Corporation. The following companies are affiliated with CSX Transportation, Inc. but are not wholly owned subsidiaries:

Baronial Transportation Corporation ("BTC")
Akron and Barberton Belt Railroad Company, The
Akron Union Passenger Depot Company (The)
Allegheny and Western Railway Company
Wesjax Development Company
Augusta and Summerville Railroad Company
Baltimore and Cumberland Valley Rail Road Extension Company, The
Beaver Street Tower Company
Belt Railway Company of Chicago
Central Florida Pipeline Corporation
Central Rail Road Company of South Carolina, The
Central Transfer Railway and Storage Company
Chatham Terminal Company
Chicago and Western Indiana Railroad Company
Clearfield and Mahoning Railway Company
Cleveland Terminal & Valley Railroad Company, The
Dayton and Michigan Railroad Company
Dayton and Union Railroad Company
Lakefront Dock and Railroad Terminal Company, The
Nicholas, Fayette and Greenbrier Railroad Company
Norfolk and Portsmouth Belt Line Railroad Company
North Charleston Terminal Company
Paducah & Illinois Railroad Company
Richmond-Washington Company ("R-W")
RF&P Corporation ("RF&P")
Terminal Railroad Association of St. Louis
Trailer Train Company
Winston-Salem Southbound Railway Company ("WSSB")

Woodstock & Blocton Railway Company
Energy Dominion
Gemetal Distribution Services Company
Yukon Pacific Corporation ("YP")
James Center Development Company ("JCDC")
Mid Allegheny Corporation ("MAC")